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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; DE LUXE CHECK PRINTERS, INCORPORATED; *et als., Petitioners,*

v.

THE CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas; JAMES L. CONROY, County Clerk of Wyandotte County, Kansas; *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

INTERNATIONAL HARVESTER COMPANY and others, your petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on August 15, 1962.

OPINIONS BELOW

The opinion of the district court (R. 39-45) is not reported. The opinion of the court of appeals (Appendix A, *infra,* pp. A1-A7) has not yet been reported.

JURISDICTION

The judgment of the court below (Appendix B(1), *infra,* p. A8) was entered on August 15, 1962. A timely petition for rehearing was denied on September 11, 1962 (Appendix B(2), *infra,* p. A8). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

In a State court *quo warranto* proceeding challenging the legality of municipal annexation ordinances, the State Attorney General was permitted to intervene in and then to dismiss that proceeding as a matter of absolute right, although it was the only one in which such legality could be judicially determined, and although such dismissal was not rested on any lack of merit in the proceeding. Petitioners, property owners in the area sought to be annexed, were denied leave to intervene, over their assertion that they would be denied due process and the equal protection of the laws in violation of the Fourteenth Amendment if they were refused the right to challenge, or to have challenged on their behalf, the legality of municipal ordinances purporting to annex their property so as to make it subject to the taxing power of the municipality. Thereafter petitioners, making the same challenge and the same Federal constitutional contentions in a Federal district court, other Federal jurisdictional prerequisites being present, were held

not to present any justiciable issues and to lack standing to sue.

The questions presented are:

1. Whether, when Federal constitutional claims cannot be asserted and adjudicated in a State court, because of lack of standing as a matter of State law, such claims can then be asserted or adjudicated in a Federal court; or whether, as held by the court below, petitioners' Federal constitutional claims cannot be heard anywhere.

2. Whether, after municipal annexation ordinances have been held invalid for noncompliance with State law, property owners who would be adversely affected by additional and similar annexation ordinances are denied the equal protection of the laws when all possibility of judicial determination of any challenge to the further ordinances is summarily cut off by the admittedly arbitrary action of State officers in dismissing such challenge on grounds not going to the legal merits thereof.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The Due Process and Equal Protection clauses of the Fourteenth Amendment to the Constitution of the United States are sufficiently familiar to the Court as not to require quotation.

2. The Kansas statutes on which petitioners ultimately rely are not involved in the present juncture of the case, where standing to sue rather than the merits is alone in issue.

STATEMENT

This case involves a second effort on petitioners' part to obtain a judicial hearing on and a determination of their claims under the Fourteenth Amendment to the Constitution of the United States.

First action. Petitioners' first effort to have their Federal claims adjudicated was made in an original proceeding in the Supreme Court of Kansas, which this Court declined to review (No. 909, Oct. T. 1959). The record in that case, which is therefore within the scope of judicial notice (*United States* v. *Pink*, 315 U.S. 203, 216; *National Fire Ins. Co.* v. *Thompson*, 281 U.S. 331, 336-337), may be summarized as follows:

For a number of years, the City of Kansas City, Kansas, has sought to annex parts of the Fairfax Industrial District in Quindaro Township, Wyandotte County, Kansas, in which is located property, both real and personal, belonging to the present petitioners as well as to some others.[1]

The first two such attempts made by Kansas City failed, when its annexation ordinances were held to be invalid and unlawful because not within the authority delegated by the legislature to the city. *State ex rel. Fatzer* v. *City of Kansas City*, 169 Kan. 702, 222 P. 2d 714; *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P. 2d 806.

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[1] Two of the present petitioners, Phillips Petroleum Company and Sealbright-Oswego Falls Corporation, were also petitioners in the earlier case. The other petitioners here, International Harvester Company; DeLuxe Check Printers, Incorporated; Sunshine Biscuit Company, Inc.; and Jones & Laughlin Steel Corporation, were not parties to the Kansas proceeding. Two of the petitioners in the first action, Girten Investment Company and Union Pacific Railroad Company, are not parties to the present proceeding.

Thereafter Kansas City adopted six additional ordinances purporting to annex portions of the Fairfax Industrial District, wherein was located property belonging to the petitioners. On the relation of the then County Attorney of Wyandotte County, *quo warranto* proceedings similar in every respect to those already cited were once more instituted. Kansas City and its officials answered, admitting the illegality of two of the six challenged ordinances, but joining issue on the balance. In accordance with its practice, the Supreme Court of Kansas referred the case to a Commissioner for the taking of testimony.

Thereafter the Attorney General of Kansas, who had initiated the first of the earlier cases, but had participated neither in the second nor in this one, filed a motion to intervene, to supersede the county attorney as relator, to strike all pleadings filed by Quindaro Township on the ground that it had no justiciable interest in the controversy, and to dismiss the *quo warranto* proceeding. The sole ground set forth in support of the motion to dismiss was that, in view of the expense of the prior litigation incurred in connection with the two prior attempts at annexation (both of which had been held illegal), it would not be in the public interest to continue the action in which the third challenge was asserted. The Attorney General's motion did not assert any lack of merit in the proceedings.[2]

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[2] As summarized in the opinion of the Supreme Court of Kansas (*State ex rel. Foster* v. *City of Kansas City*, 186 Kan. at 192, 350 P. 2d at 39), "The attorney general further moved that in view of the expense to the taxpayers of past litigation on this annexation problem of the city, it would be in the public interest to terminate and dismiss the present action."

The Attorney General himself had said in his motion (Tr. 78, No. 909, Oct. T. 1959): "• • • that during the pendency of this

The then Governor of Kansas formally directed the Attorney General to proceed with the case in order that substantial rights should not be forfeited without a hearing. The County Attorney, after being served with copies of the Attorney General's motion, specifically noted that he had no objection to his own supersession.[3]

At this juncture the several individual petitioners, who until then had considered their interests to be adequately represented by the County Attorney, filed applications to intervene. In those applications, they alleged that, if the disputed ordinances were permitted to go into effect, petitioners would be subjected to the burden of city taxes, regulation and control, and that to permit the permanent frustration of a judicial determination of the question of the validity of the ordinances would involve a denial of due process of law under the Fourteenth Amendment. Petitioners further alleged that granting the Attorney General the unlimited power to decide whether private

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action and until completion thereof, were such action not dismissed, the interest of the citizens and taxpayers of the area involved have been and would be put to inconvenience and expense in the handling of the governmental affairs of the city including, but not limited to, tax levies, assessments and collections; that on several previous occasions and over a long period of years, litigation has been carried on over attempts to settle the annexation problems of Kansas City, Kansas, attendant to the Fairfax industrial area and it is in the public interest that this action should be terminated; • • •."

[3] The Attorney General had filed a single "Motion to Supersede, Strike from the Files and Dismiss" (Tr. 77-79, No. 909, Oct. T. 1959). The County Attorney's consent to supersession, quoted by the Supreme Court of Kansas, *supra*, 186 Kan. at 192, 350 P. 2d at 39), was contained in his acknowledgment of service of that motion (Tr. 80, No. 909, Oct. T. 1959).

rights would be made the subject of judicial determination would involve a denial of the equal protection of the laws under the same Amendment. Petitioners accordingly asked that the Attorney General be compelled to continue the action to a decision on the merits, or, alternatively, that petitioners be themselves permitted to continue the action as relators in order that their own rights might be judicially determined.[4]

The Supreme Court of Kansas denied petitioners' application to intervene, on the ground that under State law a proceeding challenging an annexation ordinance could only be maintained on the relation of a County Attorney or of the Attorney General, citing *Smith* v. *City of Emporia,* 168 Kan. 187, 211 P. 2d 101; that Quindaro Township had no authority to continue the action on its own behalf; that the Attorney General had power both to supersede the County Attorney and thereupon immediately to dismiss the actions; and that the Governor's directions to the contrary were unavailing, because the Attorney General was a member of the judicial department of the State and hence independent of executive direction. *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 350 P. 2d 37.

Petitioners thereupon sought certiorari here. The then Governor of Kansas, the Hon. George Docking, moved for leave to file a brief *amicus curiae,* in the course of which he said (p. 5):

> "The true interests of the State of Kansas lie in the observance of fair play and in the preserva-

[4] The four petitions in intervention extend over Tr. 88-179 of the record in No. 909, Oct. T. 1959. Paragraph 11 of each petition, in which the Federal contentions are asserted, appears at Tr. 94, 113, 147-148, 167-168.

tion of the principle that no citizen should be denied the right to a full and fair hearing before an impartial tribunal on his contention that his interests are threatened by official action that has no warrant in law."

Governor Docking's motion for leave to file was granted, but the petition for certiorari was denied (363 U.S. 831; No. 909, Oct. T. 1959), on June 20, 1960.

Second action. The present action was filed in the United States District Court for the District of Kansas on March 1, 1961.

The plaintiffs were two of the unsuccessful applicants for intervention in the earlier proceeding, plus four others, all of them property owners in the Fairfax Industrial District (Cmplt., ¶¶ 1, 13; R. 1-2, 6); the defendants were the City of Kansas City, and the County Attorney, County Clerk, and Board of County Commissioners of Wyandotte County (Cmplt., ¶ 2; R. 2).

Jurisdiction was rested both on diversity and on a Federal question, viz., denial of rights guaranteed by the Fourteenth Amendment (Cmplt., ¶¶ 3-4; R. 2).

The complaint asserted the illegality of the six annexation ordinances (Cmplt., ¶¶ 5-12; R. 2-6), alleged plaintiffs' exhaustion of all administrative remedies, including demand on the proper officials to seek a determination of the validity of the ordinances (Cmplt., ¶ 14; R. 6), and alleged further the inadequacy of all other legal remedies (Cmplt., ¶ 15; R. 7).

It was averred that, if Kansas law provides plaintiffs no means for obtaining any adjudication of the

validity of the ordinances involved, then plaintiffs have been deprived of due process and of the equal protection of the laws (Cmplt., ¶ 16; R. 7); and that the same deprivation would follow if the County Attorney were not required to protect plaintiffs' rights and privileges (Cmplt., ¶ 19; R. 8).

Plaintiffs sought (R. 9) a declaratory judgment that the ordinances were severally invalid, an injunction against their enforcement, and a judgment directing the defendant County Attorney to institute a *quo warranto* action.

Three of the defendants filed answers (R. 33-38). The City of Kansas City then moved for judgment on the pleadings (R. 38), a document that the district court treated as a motion to dismiss (R. 40).

The latter tribunal (Circuit Judge Hill, sitting by designation) held that the action could not be maintained, in part because no citizen could question illegal annexation under Kansas law, in part because there is no standing to question legislative annexations (under the doctrine of *Hunter* v. *Pittsburgh,* 207 U.S. 161); and because municipal annexations, unchallenged by public officials or by the legislature, must be deemed to have the sanction of legislative annexations, apparently by a species of ratification (R. 39-45). Accordingly, the complaint was dismissed (R. 45-46).

On appeal (R. 46-48), the court below affirmed. It held that petitioners had no capacity to sue under Kansas law; that even the duly alleged arbitrary refusal of the County Attorney to institute a *quo warranto* proceeding made no difference in that regard; that annexation ordinances do not present

Federal questions except in cases of abuse such as *Gomillion* v. *Lightfoot,* 364 U.S. 339; and that (Appendix A, p. A7, *infra*) "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions."

REASONS FOR GRANTING THE WRIT

In this case, petitioners have been denied any opportunity for a hearing on Federal constitutional claims, claims that, as will be pointed out, are in no sense unsubstantial. Their original contention, clearly enough, was one made under State law, to the effect that certain annexation ordinances, pursuant to which their property would be subjected to taxation and regulations, were invalid because not adopted in conformity with the power delegated to the municipality by the State. That contention was in process of being adjudicated in a proceeding brought on the relation of the cognizant County Attorney. When the State Attorney General then undertook to supersede the relator and to dismiss the proceeding, on a ground not going to the merits, petitioners sought to intervene, alleging that to permit such a dismissal would deprive them of due process and of equal protection in violation of the Fourteenth Amendment: of due process because depriving them of its minimal requirement that one whose property is to be taken shall have the right to be heard as to the validity of the taking, of equal protection because depriving them of a remedy available to others similarly situated, and of which others on two similar and prior occasions had had the benefit.

The Supreme Court of Kansas, which granted the Attorney General's motion to supersede and to dismiss

and simultaneously denied petitioners' application to intervene, effectually closed the State courts to an adjudication of the Federal issues that they tendered. This Court's denial of certiorari, plainly enough, did not amount either to affirmance or approval of that decision. Now, however, the Federal courts have also refused to hear petitioners' contentions under the Federal Constitution, in a proceeding otherwise within Federal jurisdiction, relying basically on the State law that denied petitioners' access to the State courts.

The result is that petitioners have been denied a hearing in any forum on their Federal claims. We submit that this involves a palpable violation of Federal due process, one that cannot be justified or supported by any generalizations drawn out of the context of earlier annexation cases, particularly as those generalizations were later shown to be limited (*Gomillion* v. *Lightfoot,* 364 U.S. 339, 342-343).

First. The very essence of Due Process of Law, its irreducible minimum, is the right to a hearing. Consequently, where a State does not provide either a forum or a procedure for the hearing of a contention that is based on the Constitution of the United States, the Federal courts are open for its consideration. As this Court said in *Young* v. *Ragen,* 337 U.S. 235, 238, "But it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." (Italics in original.) And of course it is well settled that whatever limitations a State may properly impose, in respect of the tribunals in or procedures pursuant to which particular claims may be asserted, cannot limit the power or competence of a Federal court to entertain such claims where, as here, the requisites

of Federal jurisdiction are otherwise present. See, out of many decisions, *Railway Company* v. *Whitton*, 13 Wall. 270, 286; *Suydam* v. *Broadnax*, 14 Pet. 67; *Hyde* v. *Stone*, 20 How. 170; *Clark* v. *Bever*, 139 U.S. 96; *Chicot County* v. *Sherwood*, 148 U.S. 529.

Here, as in *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, petitioners have been denied due process of law, using that term in its primary sense of an opportunity to be heard and to defend their substantive rights. Here, as in that case, petitioners have by judicial decision been deprived in two forums of any possibility of obtaining an adjudication of their contentions. And, since State remedial means have been shown to be inadequate, the Federal court is bound to entertain the action. Cf. *White* v. *Ragen*, 324 U.S. 760; *Young* v. *Ragen*, 337 U.S. 235, *supra*; 28 U.S.C. § 2254.

Second. Petitioners' Federal claims are substantial. The consequence of the two decisions here involved is that petitioners have been completely deprived of a remedy available to others similarly situated. Under Kansas law, the validity of municipal ordinances purporting to annex property and to subject it to the municipality's taxing power is traditionally tested by *quo warranto* brought by public officers; and indeed, as has been seen, two prior Kansas City annexation ordinances were held invalid in just such proceedings. *State ex rel. Fatzer* v. *Kansas City*, 169 Kan. 702, 222 P. 2d 714; *State ex rel. Martin* v. *Kansas City*, 181 Kan. 870, 317 P. 2d 806. But in consequence of the State decision in the first action, and of the Federal ruling here, that remedy has been finally and conclusively rendered unavailable, not because any public official in the exercise of an informed discretion

has concluded that the contentions made against the additional six ordinances are frivolous, or untenable, or even that they are unlikely to prevail, but simply and solely on mere fiat (Cmplt., ¶¶ 14, 15; R. 6-7). The allegation that each of the six challenged ordinances is severally illegal (Cmplt., ¶¶ 5-13; R. 2-6) stands admitted by the motion to dismiss on which the present case was decided below (R. 38, 40). In these circumstances petitioners' allegation of arbitrary inaction on the part of the County Attorney (Cmplt., ¶ 15; R. 7) cannot, we submit, be dismissed "only as a bald conclusion" (Appendix A, *infra*, p. A5).

While, of course, the Equal Protection Clause permits classification based on any actual distinction germane to the basis of the classification, it cannot tolerate a distinction that places a premium on repetition of illegality, and that penalizes petitioners because they have been the near victims of illegality in the past. We submit that, consistent with the Equal Protection Clause, no valid classification can be made between persons who have twice previously been subjected to the attempted taking of their property by ordinances that the State's highest court has declared on challenge to be illegal, and persons who for the first time are subjected to the threat of similar ordinances that they believe to be similarly unlawful.

The action of the Attorney General and then of the County Attorney in denying petitioners any opportunity for judicial determination, *ex parte*, without any limitation on the range of their discretion, actually only by arbitrary *ipse dixit*, is itself a denial to them of any meaningful equality under the law.

Access to the courts may not thus be denied to some and granted to others in the unfettered discretion of a public official. Cf. *Cochran* v. *Kansas,* 316 U.S. 255.

Third. It will hardly be denied that to permit a municipality to impose taxes on petitioners without any authority in law would be a taking of property in violation of the due process clause. See *Cincinnati* v. *Louisville & Nash. R. R. Co.*, 223 U.S. 390, 400; *Portland Ry., Light & Power Co.* v. *City of Portland*, 181 Fed. 632 (C.C.D. Ore.), appeal dismissed, 218 U.S. 686. Yet if petitioners are denied any judicial determination of the legality of the challenged ordinances, they will be without a remedy when Kansas City takes their property by taxation pursuant to ordinances of annexation that the motion to dismiss in the present case has admitted to be illegal. For under Kansas law, the validity of a levy authorized pursuant to an illegal annexation ordinance may not be litigated in the statutory proceeding normally available to recover illegal taxes paid under protest. *Smith* v. *City of Prairie Village,* 175 Kan. 469, 264 P. 2d 1053.

True enough, if this had been a legislative annexation, petitioners could not be heard, *Hunter* v. *Pittsburgh,* 207 U.S. 161, there being here no constitutional deprivation by the act of annexation itself, as in *Gomillion* v. *Lightfoot,* 364 U.S. 339. But to speak of legislative annexation is to beg the question, for the validity of the ordinances here depends on whether they were passed as a proper exercise of delegated power. State law makes it crystal clear that Kansas municipalities do not have plenary legislative powers (*State* v. *Hannagan,* 161 Kan. 492, 498, 170 P. 2d 138, 142, and cases there cited), as indeed the two earlier Kansas City annexation cases demonstrated.

If the court below had determined that the several annexation ordinances were within the power legislatively delegated to the city, that would have ended the matter. Instead it held that the County Attorney had unreviewable power to prevent adjudication of that issue, leaving petitioners without remedy. More than that, by equating petitioners' efforts, to require public officers to seek an adjudication of legality in respect of challenged municipal ordinances, with "persons seeking to obstruct the ordinary and necessary exercise of a state's political functions" (Appendix A, *infra*, p. A7), the court below emphasized the distorted calculus underlying its decision.

In any event, the result reached below is plainly inconsistent with many decisions here, which hold that, even in an area where the State legislature has plenary authority, one whose rights are affected by a purported exercise of the delegated power, where the legislature makes only a limited and conditional grant, is entitled to a hearing as to the validity of that exercise. *Browning* v. *Hooper,* 269 U.S. 396, 405-406; *Embree* v. *Kansas City Road Dist.,* 240 U.S. 242, 247; *Londoner* v. *Denver,* 210 U.S. 373, 385-386; *Parsons* v. *District of Columbia,* 170 U.S. 45, 52; *Fallbrook Irrigation District* v. *Bradley,* 164 U.S. 112, 166-167, 174-175.

Thus the ruling now sought to be reviewed, which denies petitioners any opportunity for judicial determination as to whether the authority that purports to take their property is lawfully exercised, actually deprives them of minimal due process, because it denies them all opportunity to be heard on the questions that are admittedly decisive as to the validity of the taking.

Fourth. As we have said, this is not a *Hunter* v. *Pittsburgh* situation because no non-delegated legislation is involved. The court below said (Appendix A, *infra,* p. A6), that petitioners' "primary attack upon the validity of the Kansas City ordinance is limited to the claim that the ordinance violates state law." It is of course true that the merits of the underlying controversy depend entirely on State law. But the court below did not purport to decide the merits, and it quite ignored the gravamen of petitioners' complaint here, namely, that by being denied a hearing anywhere on their State law contentions, they are being deprived of Federal rights—the right to be heard, and the right to be free from a discrimination that lacks any rational basis. Here, as in *Reynolds* v. *Cochran,* 365 U.S. 525, denial of any opportunity to be heard on an issue of State law involves a denial of Federal right.

The Federal rights asserted by petitioners cannot, we submit, be verbalized away simply because, in the normal course, petitioners and those similarly situated must depend on public officials for vindication thereof. If, for instance, Alabama had adhered to the rule that the fixing of municipal boundaries could only be questioned in proceedings instituted by State or municipal law officers, when could the rights infringed by the annexation measure considered in *Gomillion* v. *Lightfoot* have been asserted? Certainly not before the Greek Kalends that Chief Judge Cardozo invoked (*Matter of People (Russian Reinsurance Co.),* 255 N.Y. 415, 422, 175 N.E. 114, 116)—if even then.

The present case is in no sense unique or unlikely to arise again. The number of municipal annexation proceedings has been steadily increasing, to such an extent that, both in 1960 and in 1961, the number of

annexing municipalities with a population of 5000 or more exceeded 700; this is, in each of those years, more than one out of every five municipal governments of that size in the entire country. See International City Managers' Ass'n, *The Municipal Year Book, 1961,* p. 57; *id., 1962,* p. 51.

Moreover, some eleven States, in addition to Kansas, currently adhere to the rule that private persons lack capacity to attack the fixing or extension of municipal boundaries; this is four more jurisdictions than were thus aligned only a decade ago. The cases are collected in 13 A.L.R. 2d 1279; 1 A.L.R. 2d Supp. Service (1960 issue) 942; 3 *id.* (1962 issue) 257.

The questions tendered by the present petition are therefore of significant public importance.

CONCLUSION

The right to be heard is fundamental to the concept of Due Process of Law. Its exercise cannot properly depend on the uncontrolled and uncontrollable whim of a public officer. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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OCTOBER 1962.

APPENDIX

APPENDIX A

OPINION BELOW

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 6940

July Term, 1962

INTERNATIONAL HARVESTER COMPANY, a corporation;

PHILLIPS PETROLEUM COMPANY, a corporation;

DE LUXE CHECK PRINTERS, INCORPORATED, a corporation;

SUNSHINE BISCUIT COMPANY, INC., a corporation;

SEALRIGHT-OSWEGO FALLS CORPORATION, a corporation;

and

JONES & LAUGHLIN STEEL CORPORATION, a corporation,
Appellants,

vs.

THE CITY OF KANSAS CITY, KANSAS, a municipal corporation;

ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas;

JAMES L. CONROY, County Clerk of Wyandotte County, Kansas; and

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF WYANDOTTE, KANSAS, *Appellees.*

[Filed August 15, 1962]

Appeal from the United States District Court
for the District of Kansas

Leonard O. Thomas (J. Donald Lysaught and Ervin G. Johnston, and Stanley, Schroeder, Weeks, Thomas & Lysaught, of Counsel, were with him on the brief) for Appellants.

J. W. Mahoney, Assistant City Attorney, (C. W. Brenneisen, Jr., City Attorney, City of Kansas City, Kansas, was with him on the brief) for Appellees.

Before PHILLIPS, PICKETT and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

This suit was brought by corporate property owners within an area known as Fairfax Industrial District, which lies between Kansas City, Kansas, and the Missouri River, to have declared invalid an annexation ordinance. The plaintiffs claimed federal jurisdiction on the basis of diversity of citizenship[1] and violation of their rights under the fourteenth amendment to the United States Constitution.[2] It is asserted and not contested that the pecuniary repercussions of the annexation will amount to more than $10,000 in taxes assessed against each of the plaintiffs.

---

[1] 28 U.S.C.A. 1332: "(a) The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000 exclusive of interest and costs, and is between—

"(1) citizens of different states;

• • • "

[2] 28 U.S.C.A. 1331: "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitutions, laws, or treaties of the United States.

• • • "

The trial court dismissed the action upon the grounds that plaintiffs, under Kansas law, had no capacity to maintain the action and had presented no justiciable question under federal law.

Although plaintiffs' complaint seeks multiple and varied relief and their appellate approach to the issues is equally broad we think the determinative questions can be simply stated thus: Under Kansas law, is it the duty of a county attorney to initiate judicial proceedings questioning the validity of a municipal annexation ordinance when demand upon him to do so is made by a property owner within the annexed area? Can such property owner, under Kansas law, attack the validity of an annexation ordinance upon allegation that the county attorney arbitrarily refuses to act? And finally, do the Kansas procedures pertaining to judicial review of the validity of annexation ordinances, viewed against the factual background of the case, amount to a denial of due process under federal law?

The Board of City Commissioners of the City of Kansas City passed the questioned ordinance, No. 41525, in 1958. The then county attorney, Martin, commenced an original proceeding in the District Court of Kansas in the nature of quo warranto to test the validity of the ordinance under General Statutes of Kansas 1949, 13-1602, but while the action was still pending he was succeeded in office by the appellee Foster. The attorney general of Kansas later intervened in the case, superseded the county attorney as the representative of the state, and moved to dismiss the proceeding because of the expense of this and prior litigation upon the problem (State ex rel. Fatzer v. City of Kansas City, 169 Kan. 702, 222 P. 2d 714; State ex rel. Martin v. City of Kansas City, 181 Kan. 870, 317 P. 2d 806) and in the public interest. The motion of the attorney general was granted and the proceeding was dismissed. State ex rel. Foster v. City of Kansas City, 186 Kan. 190, 350 P. 2d 37. Two of the present appellants there sought leave to

intervene as did Quindaro township, which had claimed the area within its domain, but were denied the right to proceed.

After an unsuccessful attempt to obtain a Writ of Certiorari from the United States Supreme Court, 363 U.S. 831, demand was made upon Foster to initiate further proceedings and, upon refusal, this action was filed in the United States District Court for the District of Kansas.

Case law in Kansas has firmly established the rule that the validity of a municipal annexation ordinance can be tested only by the state acting through one of its proper officers. In Smith v. City of Emporia, 168 Kan. 187, 211 P. 2d 101, a private citizen sought relief against an annexation ordinance of the City of Emporia. After an exhaustive review of Kansas cases the Supreme Court of that state held that the plaintiff lacked capacity to sue. Similarly, in Lampe v. City of Leawood, 170 Kan. 251, 225 P. 2d 73, it is stated:

> ". . . in this jurisdiction actions to inquire into the validity of the proceedings creating a municipal corporation, or modifying its boundaries, cannot be maintained by a private individual. They can be prosecuted only by the State acting through one of its proper officers, such as the county attorney or the attorney general. . . ."

Appellants would distinguish these authorities and hold them inapplicable because of allegations in the case at bar that demand was made upon the county attorney to institute an action, that the county attorney refused, and the additional claim that such refusal was arbitrary. We see no merit to these contentions.

Quo warranto proceedings are an exclusive remedy to test the city's exercise of its purportedly granted powers in Kansas and traditionally assert the interests of the sovereign in preventing the invasion of its prerogatives. In such an action, the state is the plaintiff and the county attorney and attorney general seek only the vindication of

the rights of the state, State ex rel. Mitchell v. Sage Stores Co., 157 Kan. 622, 143 P. 2d 652, aff'd. 323 U.S. 32, 65 S. Ct. 9, 89 L. Ed. 25.

The power to institute such an action is one of discretion not compulsion and the proper public official has the duty not to prosecute an unmeritorious action. State ex rel. Foster v. City of Kansas City, Kansas, 186 Kan. 190, 350 P. 2d 37. If simple demand by a taxpayer would change this rule the responsibility of public officials would be meaningless. It is true that in Bobbett v. State, 10 Kan. 9 (1872) there appears dicta to the effect that an individual may compel or control quo warranto proceedings where he holds a particular (though undefined) right independently of that which he holds as a member of a public class. Such interest, however, cannot be that of citizen, resident or taxpayer nor, indeed, even a claimant for tort whose cause of action is dependent upon the extent of valid city boundaries. Horner v. City of Atchison, 93 Kan. 557, 144 P. 1010. Appellants here claim no interest except that of landowners which the annexed area.

The allegation in appellants' complaint that the refusal of the county attorney to institute proceedings was arbitrary appears only as a bald conclusion. The trial court interpreted (and we think correctly) the factual allegations of the complaint as indicating appellants' claim to be thus:

> "So it would seem that the plaintiffs feel that upon request to the county attorney to prosecute such an action the county attorney should commence an action, and if he refuses, he is arbitrary and capricious. An examination of the cases cited by counsel does not indicate in any manner that the county attorney's discretion must result in the same conclusion as a part of the public which he represents."

Appellants now argue,[3] but apparently for the first time, that opportunity should have been given them to show that the refusal to act by the county attorney was perhaps motivated by political expediency, lack of legal acumen or energy, corruption or disagreement with the desirability of the law itself. It is sufficient to say that the pleading of a bald conclusion unsupported by factual allegation will not save an otherwise fatally defective pleading and that in any event the traditional remedy for such conditions, should they exist, lies at the polls or in the more drastic steps for removal from office. We conclude that the trial court correctly held that appellants had no capacity to sue under Kansas law and that the action was properly dismissed as premised on diversity jurisdiction.

Having no private remedy under Kansas law is, appellants contend, a violation of due process under the fourteenth amendment. And certain it is that a state cannot legislate upon even a matter of complete state interest in such a manner as to abuse a federal constitutional right. Gomillion v. Lightfoot, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110. But in the case at bar appellants' primary attack upon the validity of the Kansas City ordinance is limited to the claim that the ordinance violates state law. Federal courts do not review such a claim under the jurisdiction conferred by 28 U.S.C.A. 1331 and the result of error in the administration of state law, though injury may result, is not a matter of federal judicial cognizance under the due process clause of the fourteenth amendment. Here Kansas has provided and determined the powers, methods and procedures for the annexation of property by municipal corporations and the safeguards thought necessary to pro-

[3] This contention is presented only in the abstract. Any attempted proof in support of the theory would be faced head-on by the fact that in the earlier action the county attorney had been superseded by his superior, the attorney general, and the proceeding dismissed "in the public interest." State ex rel. Foster v. City of Kansas City, supra. It is difficult to see how under these circumstances the refusal of the county attorney to refile the action could be arbitrary.

tect against abuse. Such a subject is a proper one for state control and:

> "We have nothing to do with the policy, wisdom, justice or fairness of the act under consideration of those to whom the state has entrusted its legislative power, and their determination of them is not subject to review or criticism by this court."
>
> • • •
>
> "Municipal corporations are political subdivisions of the State. • • • For the purpose of executing these powers properly and efficiently they usually are given the power to hold • • • property. The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state • • • The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation • • • In all these respects the State is supreme, and its legislative body, conforming its action to the state constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may by such changes suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason • • • The power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it." Hunter v. Pittsburgh, 207 U.S. 161, 28 S. Ct. 40, 52 L. Ed. 151.

See also: Hagar v. Reclamation District No. 108, 111 U.S. 701, 4 S. Ct. 663, 28 L. Ed. 569; Davidson v. New Orleans, 96 U.S. 97, 24 L. Ed. 616; Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369.

Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions and the judgment of the trial court is accordingly affirmed.

APPENDIX B

JUDGMENTS BELOW

1. JUDGMENT OF AFFIRMANCE

[Caption Omitted]

Judgment.

Twenty-Fourth Day, July Term, Wednesday, August 15th, 1962.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Kansas and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

2. ORDER DENYING REHEARING

[Caption Omitted]

Order denying appellants' petition for rehearing.

Second Day, September Term, Tuesday, September 11th, 1962.

Before Honorable Orie L. Phillips, Honorable John C. Pickett and Honorable David T. Lewis, Circuit Judges.

This cause came on to be heard on the petition of appellants for a rehearing herein and was submitted to the court.

On consideration whereof, it is ordered by the court that the said petition be and the same is hereby denied.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 550

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; DE LUXE CHECK PRINTERS, INCORPORATED, ET AL., *Petitioners,*

v.

THE CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, COUNTY ATTORNEY OF WYANDOTTE COUNTY, KANSAS; JAMES L. CONROY, COUNTY CLERK OF WYANDOTTE COUNTY, KANSAS, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement Of The Case

This case is the second effort by the petitioners for a Writ of Certiorari involving the same facts.

This Court declined to review the first petition.[1] The only difference between this petition and the first is that this petition is to review the judgment of the United States

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[1] *Girten Investment Co., et al.* v. *State of Kansas ex rel. John Anderson, Jr. et al.*, 363 U.S. 831. As noted in footnote 1 of the Petition, two plaintiff corporations in this case were parties to the *Girten Investment Company* case and four new corporations have joined as plaintiffs in this case.

Court of Appeals for the Tenth Circuit while the Petition in Case No. 909 was to review the judgment of the Supreme Court of the State of Kansas.

The Fairfax Industrial District is an area of approximately 2,500 acres which lies north and east of Kansas City, Kansas, completely surrounded by the city boundaries and the Missouri River. For years the city has extended benefits to the area including water, light, power and other municipal services. The district is an urban area with substantial economic and sociological ties to Kansas City.[2]

In early 1958, Kansas City, acting under authority of Kansas General Statutes 13-1602, 1949, and in keeping with the Kansas Supreme Court's interpretation thereof, enacted Ordinance 41525,[3] which annexed approximately 190 acres of the area including property owned by the petitioners.

In Kansas the rule is well settled that any attack on an annexation ordinance, since it involves the corporate existence of a municipal corporation, may be brought only by the state in a *quo warranto* proceeding on relation of the attorney general or, under him, by the county attorney.[4]

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[2] *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 872, 317 P.2d 806.

[3] Adopted March 25, 1958. The cited statute confers several grants of authority on the city to achieve annexation. Under one branch of authority, the city may annex any amount of unplatted land which "lies within (or mainly within) any city." Pursuant to the interpretation of this phrase by the Kansas Supreme Court, *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P.2d 806, requiring a common perimeter with the city boundary of more than 50% of the total perimeter of the annexed area, Kansas City adopted Ordinance No. 41525. The approximately 190 acres annexed had an entire perimeter of 11,222.16 ft., of which 5,732.54 ft., or more than 50% comprised a common boundary with the city at the time of annexation. The Kansas Supreme Court had recognized the area as unplatted land. *Id.*, 181 Kan. 870, 875.

[4] G.S. Kan. 60-1603; *Smith* v. *City of Emporia*, 168 Kan. 187, 190 P. 2d 101, collects the cases and sums up that "the rule founded on public policy ... has been the settled law of this state for more than half a century...."

Such a *quo warranto* proceeding must be brought within one year after the adoption of an annexation ordinance.[5]

In 1958 the County Attorney commenced a *quo warranto* proceeding on behalf of the state to test Ordinance No. 41525.[6]

The defendants were Kansas City and Quindaro Township, which formerly had jurisdiction over the annexed tract. Following pleadings by the parties, the Kansas Supreme Court appointed a Commissioner on June 30, 1959 to hear evidence and recommend findings. In July, the State's Attorney General came into the case. Having reached the view that the statutory annexation conditions had been met, that the common perimeter of the city and tract boundary was more than 50% of the total tract boundary, that there were not sufficient grounds for maintenance of the action, and that in view of the expense involved in previous cases prosecution in this case amounted to an harassment of the city, he concluded that it would be in the public in-

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[5] G.S. Kan. 12-502(c).

[6] Ordinance No. 41525, briefly described in footnote 3 above, and set out in full at page 11 of the Transcript of the Record, is the primary ordinance involved, notwithstanding mention by petitioners of six ordinances (Petition, p. 5, 8). Ordinance No. 41358 of December 10, 1957, was repealed by No. 41525, thus eliminating a dispute over the description of the boundaries of the annexed area and slightly reducing its size; and passage of No. 41427, which covered a small portion of the tract in the repealed ordinance, was abandoned after its first reading of January 14, 1958. Hence the meaning of the city's "admission" in the pleadings respecting these two repealed and abandoned ordinances was obviously not "invalidity" as claimed by petitioners (Petition, pp. 4, 16), but "nonexistent" and therefore not relied upon for validity of the annexation. Ordinances No. 41557 of April 15, 1958, No. 41659 of June 24, 1958 and No. 41700 of July 22, 1958, each involved a small portion of less than 20 acres of the tract covered by No. 41525 and were adopted under a second branch of the statutory authority (G.S. 13-1602) authorizing annexation of less than 20 acre tracts. These were adopted out of an abundance of caution and were not and are not necessary for the support of the annexation made in this case.

terest to terminate and dismiss the action.[1] Accordingly, on July 22, 1959 the Attorney General moved to intervene and supersede the county attorney, to remove Quindaro Township from the case as having no justiciable interest, and to dismiss the action.

At a hearing before the Commissioner, in August 1959, the county attorney affirmed his acquiescence in being superseded. The township asked for a stay against the Attorney General. Four private corporations, Girten Investment Company, Phillips Petroleum Company, Sealright-Oswego Falls Corporation, and Union Pacific Railroad Company, the four of whom were petitioners in No. 909, asked for leave to intervene and to maintain the action themselves as relators for the state alleging that otherwise their property would be subjected to municipal taxes levied, and to municipal burdens imposed, by Kansas City with no opportunity to have the issue of whether the annexation was void determined by the court.

The Commissioner concluded that the Attorney General could not supersede the county attorney and dismissed the case, that Quindaro Township could maintain the action to a final conclusion, and were it not for these conclusions

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[1] *State ex rel. Foster* v. *City of Kansas City*, 186 Kan. 190, 350 P.2d 37. In the Kansas Attorney General's reply to Quindaro Township's Motion for Rehearing in that case, John Anderson, then Attorney General, stated: "In the second annexation case (181 Kan. 870) the court defined the words 'mainly within' as a condition upon which annexation is sanctioned by G.S. 1959 Supp., 13-1602a. It was there stated that those words call for a common perimeter of more than fifty per cent. By that it meant that so much of the City's present limits which touch the tract to be annexed must be more than one-half the total boundary of the tract sought to be annexed. As stated in the Attorney General's argument in this case, it was his opinion that this condition was fully met by the ordinance in question, and that there was no sufficient ground for the maintenance of the action; and that in view of the expense incurred in the previous case, the further prosecution of this case amounted to an harassment of the city. He therefore concluded that it was his duty to enter this case and to cause the same to be dismissed."

the four corporations might be allowed to intervene and maintain the action.[8]

The Kansas Supreme Court in its unanimous opinion of March 5, 1960[9] disagreed with these conclusions. The court held that the Attorney General could, as a matter of law, and did in fact supersede the county attorney; and "If, therefore, the Attorney General considered the action unmeritorious, he not only had the authority but he also had a duty to move for dismissal."[10] The court further held that neither Quindaro Township nor the individual intervenors had any status to question the city's annexation of new territory "which is a reorganization of the city that in turn involved its corporate validity. Such an attack can only be made by the state."[11] The court terminated the proceeding by ordering the case dismissed.[12] A petition for a Writ of Certiorari based on the same contentions as now presented herein was denied by this Court on June 20, 1960.[13]

On March 1, 1961, almost three years after the passage of Ordinance No. 41525, the Petitioners filed the complaint involved here in the United States District Court for the District of Kansas.[14] Petitioners claim among other things a right in themselves as individuals to an adjudication by a court as to the validity of the annexation ordinances.[15]

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[8] *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 199, 350 P.2d 37, 43.

[9] *Ibid.*

[10] 186 Kan. 190, 197, 350 P.2d 37, 42.

[11] Citing the Kansas cases and those of other jurisdictions, 186 Kan. 190, 198, 350 P.2d 37, 43.

[12] 186 Kan. 190, 199, 350 P.2d 37, 44.

[13] *Girten Investment Co., et al.* v. *State of Kansas ex rel. John Anderson, Jr.,* 363 U.S. 831.

[14] Transcript of the Record 1-9.

[15] See Petition pp. 11-12.

The defendant City answered setting up the fact that Phillips Petroleum Company and Sealright-Oswego Falls Corporation had raised exactly the same contentions in the original action in the Kansas Supreme Court and in this Court;[16] that all procedures followed in the enactment of all the ordinances were exactly the statutory procedures specified by the laws of Kansas, which had been approved by the Kansas Supreme Court;[17] and that the Attorney General had concluded that an action to challenge the ordinances was unmeritorious since the formula spelled out by the Kansas Supreme Court[18] had been followed. The city further answered that there was no abuse of due process since the Kansas statutes provide a complete pattern of legislative and administrative process coupled with discretionary resort to judicial review, if review is warranted in the judgment of the proper officers of the State.[19] The defendant Foster, county attorney, answered setting out that in the sound exercise of his discretion, he had determined that a judicial review of the attacked ordinances was not warranted and that there were no legal objections to any of the ordinances set out in the complaint.[20]

The United States District Court for the District of Kansas dismissed the action upon the grounds that plaintiffs, under Kansas law, had no standing to maintain the action and had presented no justiciable question under federal law.[21]

The United States Court of Appeals for the Tenth Cir-

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[16] Transcript of the Record 36; see also, *supra*, Note 1.

[17] *State ex rel. Fatzer* v. *City of Kansas City*, 169 Kan. 702, 222 P.2d 714.

[18] *State ex rel. Martin* v. *City of Kansas City*, 181 Kan. 870, 317 P.2d 806.

[19] Transcript of the Record 37.

[20] *Id.* at 35.

[21] Petition, Appendix A 3.

cuit affirmed the decision of the district court stating that neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercise of a state's political functions.[22]

ARGUMENT

I

The Issue

As stated by petitioners at page 4 of the Petition for Certiorari:

> "This case involves a second effort on petitioner's part to obtain a judicial hearing on and a determination of their claims under the Fourteenth Amendment to the Constitution of the United States."

Petitioners also concede on page 16:

> "It is, of course, true that the merits of the controversy depends entirely on state law."[23]

The issue in this case is identical with the issue previously adjudicated in the Kansas State Courts and which this Court declined to review on Petition for Certiorari.[24]

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[22] *Id.* at A 7.

[23] Rulings by the highest court of the state on questions of state law are conclusive upon the Supreme Court of the United States. *Hunter* v. *Pittsburgh*, 207 U.S. 161, 176. Furthermore, the lack of substance in the present petition is further demonstrated by the statement of Petitioners in their original Petition to this Court (No. 909, 1959): "Petitioners have throughout this litigation conceded, and now concede, that had the legislature of Kansas passed a statute in precisely the same language as that of the ordinance here sought to be attacked, they would have no basis for complaint." A similar concession is made by Petitioners at p. 14 of their Petition in this case.

[24] 363 U.S. 831.

Namely, is the exercise by a municipality of the legislative function of annexation subject to challenge in a court by private parties having no individual standing to do so under state law, and further, if their right to challenge is denied does this comport with due process and equal protection of the laws?

After certiorari was denied in the former case, *supra*, another demand was made upon the County Attorney of Wyandotte County to initiate further proceedings and upon refusal, this action was filed in the United States District Court for the District of Kansas. The element supposed to allow petitioners to prevail here where they failed before is that instead of the writ being directed to the Supreme Court of Kansas as before, it is now to be directed towards the United States Court of Appeals for the Tenth Circuit.[25] However, the doctrine of *res judicata* operates as a bar to this action in the Federal Courts since the case has already been decided in the Supreme Court of Kansas and this Court has already denied certiorari.[26]

This action is also barred by a Kansas statute which prohibits its maintenance even by the Attorney General or county attorney after one year has elapsed from the time the ordinance was enacted.[27]

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[25] A clear admission that the same issue previously adjudicated is again presented herein is found at page 2 of Petition for Certiorari wherein it is stated:

> Thereafter (after certiorari was denied in Case No. 909), petitioners making the same challenge and the same Federal Constitutional contentions in a Federal district court . . . were held not to present any justiciable issues and to lack standing to sue.

[26] *Angel* v. *Bullington*, 330 U.S. 183; *Grubb* v. *Public Utilities Commission of Ohio*, 281 U.S. 470.

[27] Kan. G. S. 12-502(c)(1957 Supp.).

II

Reasons For Denying The Writ

A. *Petitioners Have No Standing To Maintain This Action.*

In Kansas, as in many other states, the rule is well settled that an attack on an annexation ordinance may be made in a *quo warranto* action against the annexing municipality but brought only by the state in the discretion of its proper officers.[28] The latter are limited to the State Attorney General or the county attorney, but a county attorney may be superseded by the State Attorney General as has occurred in this case.[29] In this case both of the officials having the authority to do so, i.e., the Attorney General and the county attorney, have officially concluded there is no merit in Petitioner's claim herein and have, in the exercise of their discretion, taken that position in the courts where those claims have been advanced. And, as already stated, *supra,* even these officials are prohibited by a Kansas Statute (G. S. 12-502(c)) from challenging the annexation ordinance in question at any time more than one year after its adoption in 1958.

Sound public policy requires limiting such actions to state officials. When an annexation ordinance is attacked in the courts, the corporate existence of a municipality is questioned, and to allow any and all disgruntled individuals to launch such an attack would lead to uncertainty and

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[28] See G.S. 60-1603; *Smith* v. *City of Emporia, supra,* Note 4; *Lampe* v. *City of Leawood,* 170 Kan. 251, 225 P. 2d 73. An array of like authorities in other states is collected in 13 A.L.R. 2d 1279.

[29] See *State ex rel Foster* v. *Kansas City,* 186 Kan. 190, 350 P. 2d 37; *State* v. *Finch,* 128 Kan. 665, 280 P. 910.

interminable confusion in city affairs and result in a breakdown of municipal government.[30]

Accordingly, an individual property owner and taxpayer in Kansas has no standing to sue in an action to question an annexation ordinance, either directly or collaterally.[31]

Petitioners have conceded that the merits of the underlying controversy depend entirely on state law.[32] *They have therefore, conceded that they have no Federal right or standing to maintain this action.*[33]

Petitioners' contention that they have been denied "a hearing anywhere" with regard to this matter[34] is difficult to understand. The decision of the Tenth Circuit Court of Appeals[35] contains ample evidence that they have indeed, been heard on their right to challenge, in practically every court in Kansas, both State and Federal. In addition, the laws of Kansas appropriately provide normal due process safeguards.[36]

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[30] See *Smith* v. *City of Emporia, supra,* Note 4; *Topeka* v. *Dwyer,* 70 Kan. 244, 78 P. 417. Only the state acting in direct proceedings can challenge the validity of a municipal corporation. *Shapleigh* v. *San Angelo,* 167 U.S. 646, 655-656; *Tulare Irrigation District* v. *Sheppard,* 185 U.S. 1, 14.

[31] See *Smith* v. *City of Emporia, supra,* Note 4; *Lampe* v. *City of Leawood, supra,* Note 28; *Topeka* v. *Dwyer, supra,* Note 30; *Gardner* v. *Benn,* 81 Kan. 442, 105 P. 435; Kan. G. S. 60-1603. Petitioners argument that they are entitled, as of right, to a court test of the annexation ordinance ignores the holdings of this Court that process, other than a judicial determination, is due process in the consummation of political boundary line changes and the imposition of tax burdens. *Kelly* v. *Pittsburgh,* 104 U.S. 78; *Hagar* v. *Reclamation District No. 108,* 111 U.S. 701; *Davidson* v. *New Orleans,* 96 U.S. 97; *Fallbrook Irrigation District* v. *Bradley,* 164 U.S. 112.

[32] Petition, p. 16.

[33] See *Smith* v. *City of Emporia, supra,* Note 4; *Hunter* v. *Pittsburgh, supra,* Note 23

[34] Petition, p. 16.

[35] *Id.,* Appendix A.

[36] Under Kansas law a city may annex territory, pursuant to certain standards prescribed by general statutes, and after notice to county officials

No amount of camouflage can conceal the fact that Petitioners are once again asking this Court to overturn decision and policy carefully evolved by the courts and legislature of Kansas in order to improvise for Petitioners a private individual judicial remedy in place of the established remedy (combining the legislative, administrative and judicial aspects summarized, infra), simply because they have disagreed with the representative of the State, the Attorney General of Kansas, and with the County Attorney on the desirability of resorting to judicial review. Historically for good and sound policy reasons individual standing to challenge has been withheld in favor of legal officers of the state who are clothed with discretion to challenge where appropriate.[37] Obviously, the proposed improvisation of Petitioners is beyond the scope of action by this Court. What Petitioners are asking for is a discrimination in their favor as compared to the 130,000 other property owners of Kansas City.

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and two public meetings, which affords opportunity, in the first instance, for persons concerned to be heard and to support or oppose the proposal, if they desire, before the governing body of the city. Kansas G.S. 13-1601, 13-1602; 13-2901, 13-2902, as revised L. 1959 Ch. 64. Thereafter, if the annexation is consummated, the law reposes in the State Attorney General, or under him the county attorney, authority to administratively determine that the city has complied with the requirements of law. That official is open to persuasion by private persons that the municipal action was proper or improper, but the judgment is his. If, in his judgment, there has been no failure of compliance, that is the end of the matter. If the Attorney General, or under him, the county attorney, is of the view that the action taken was or may have been in violation of law, he may, on behalf of the state, within one year, bring an action in *quo warranto* and obtain a judicial decision. Thus, there is a complete pattern of legislative and administrative process, coupled with discretionary resort to judicial review if review is warranted in the judgment of the public officers in charge.

[37] See *supra*, Note 28.

B. *Petitioners Raise No Substantial Federal Question*

This Court has held repeatedly that the State may expand or contract the territorial area of municipal corporations with or without the consent of the citizens who reside therein or even against their protest and that it may do so "unrestrained by any provision of the Constitution of the United States."[38] Specifically, this Court has rejected the contention that the Fourteenth Amendment was violated by such state action.[39]

Petitioners' principal attack in this case was directed at the validity of the Kansas City ordinance and was limited to the claim that the ordinance violates state law. It is well established that federal courts do not review such a claim.[40] Furthermore, even in the event of error in the administration of state law, it is not a matter of federal judicial cognizance under the due process clause of the Fourteenth Amendment, where, as here, a state has provided and determined the ways and means of procdures for the annexation of property by municipalities and the safeguards necessary to protect against abuse. The following language from the case of *Hunter* v. *Pittsburgh, supra,* is most enlightening in this respect:

> We have nothing to do with the policy, wisdom, justice or fairness of the Act under consideration of those to whom the State has entrusted its legislative power and their determination of them is not subject to review or criticism by this Court. . . .
>
> Municipal corporations are political subdivisions of the State. . . For the purpose of executing these powers

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[38] *Hunter* v. *Pittsburgh,* 207 U.S. 161, 179.

[39] *Hunter* v. *Pittsburgh, Ibid; Kelly* v. *Pittsburgh, supra,* Note 31 and other cases cited at 207 U.S. 178.

[40] *Hunter* v. *Pittsburgh, supra,* Note 23.

> properly and efficiently they usually are given the power to hold... property. The number and nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised, rests in the absolute discretion of the State . . . The State, therefore, at its pleasure may modify, withdraw all such powers, may take without compensation such property, hold itself or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the Charter and destroy the corporation . . . In all these respects, the State is supreme, and its legislative body conforming its action to the State Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. Although the inhabitants and property owners may, by such changes, suffer inconvenience, and their property may be lessened in value by the burden of increased taxation, or for any other reason . . . the power is in the State and those who legislate for the State are alone responsible for any unjust or oppressive exercise of it.[41]

Try as they might, Petitioners are unable to reasonably distinguish this case from the law of *Hunter*. They contend once again as they did in their prior case involving the same conflict,[42] that they are entitled to be heard on the question of whether or not Kansas City properly exercised delegated powers.[43] This contention is unsupportable because in delegating annexation powers to Kansas City, the State has reserved to itself through the county Attorney

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[41] *Hunter* v. *Pittsburgh*, 207 U.S. 161, 176, 178, 179; see also *Hagar* v. *Reclamation District*, No. 108, 111 U.S. 701.

[42] 363 U.S. 831.

[43] Petition, p. 14.

or through the Attorney General, the right to question the manner of the delegate city doing what the state itself could do unhampered by the Fourteenth Amendment.[44] It therefore is difficult to perceive any individual being deprived of due process of law, if the state chooses not to question the exercise of such powers. It is also difficult to understand how any single individual in the state has been deprived of equal protection of the laws, when the laws, with propriety, have conferred on no individual the right to challenge, but have reserved the right to the state acting through designated officials. Simply because the state has brought a testing action in some cases, does not mean that failure to bring, or continue such action in others is a denial of "equal protection of the laws."[45]

The case of *Gomillion* v. *Lightfoot*, 364 U.S. 339 cited by Petitioners is obviously not in point. It involved the Fifteenth Amendment whereas Petitioners are relying upon the Fourteenth Amendment in this case. Furthermore, as

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[44] See *supra*, Notes 4 and 41.

[45] Petitioners, in support of their contention that their "federal claims are substantial," allege that the action of the Attorney General and then of the County Attorney in denying Petitioners "any opportunity for judicial determination" was arbitrary and is in itself a denial of any meaningful equality under the law. The allegation of Petitioners (Petition, p. 13) that each of the six challenged ordinances is severally illegal, was never admitted by Respondent and certainly it was never supported. The District Court in disposing of the allegation that the County Attorney acted arbitrarily, stated in effect that it was the contention of the Petitioners that upon request of the County Attorney to prosecute such an action, the County Attorney should commence an action and if he refuses he is arbitrary and capricious. As characterized by the District Court, this is nothing more than pleading a "bald conclusion unsupported by a factual allegation and it cannot save an otherwise fatally defective pleading." While it is true that the County Attorney did not bring *quo warranto* proceedings, this is understandable due to the fact that in the earlier action, the County Attorney had been superseded by his superior, the Attorney General, and the proceedings dismissed "in the public interest." That being the case, the refusal of the County Attorney to refile the same action here cannot be characterized as being arbitrary.

admitted by Petitioners [46] there is in this case no constitutional deprivation by the act of annexation itself, as occurred in the Gomillion case.[47] However, the following statement by Justice Frankfurter in *Gomillion* is helpful in further explaining the law applicable to this case:

> If one principle clearly emerges from the numerous decisions of this Court dealing with taxation, it is that the due process clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a state exercise of its political powers.[48]

Justice Frankfurter explained the holding in the *Hunter Case* as being:

> . . . That a citizen of one municipality is not deprived of property without due process of law by being subjected to increased tax burdens as a result of the consolidation of its city with another. [49]

The cases of *Young* v. *Ragen* [50] involving *habeas corpus* and the Illinois State Courts, and *Brinkerhoff-Faris Company* v. *Hill* [51] involving a tax assessment on certain bank stock and the Missouri Supreme Court, though relied upon by Petitioners, are not in point here, either from a substantive or procedural view. The posture of this case and these two cases are certainly not the same since Petitioners

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[46] Petition, p. 14.

[47] In *Gomillion* it was charged that the state legislature misused its powers in fixing municipal boundaries as a device to cut off voting rights of a group of its Negro citizens.

[48] 364 U.S. 339, 343.

[49] *Id.* at 342.

[50] 337 U.S. 235.

[51] 281 U.S. 673.

are presently attempting to come from a Federal Circuit Court of Appeals and not from state courts.

Petitioners have not alleged, and cannot in truth point to any special or peculiar injury to their property or personal rights which would call for deviation from the pattern of procedure provided by Kansas in this case. Petitioners will be paying the same taxes paid by all residents of Kansas City. No discrimination against Petitioners is alleged. Petitioners have merely assumed throughout their argument that subjection of their property to nondiscriminatory reasonable taxation by Kansas City (in place of Quindaro Township) is an injury and a sufficient injury to call for federal intervention. This is contrary to the rulings of this Court,[52] and petitioners' request for federal intervention goes beyond the settled limitations of federal jurisdiction in this regard.[53]

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[52] *Hunter* v. *Pittsburgh, supra,* Note 38.

[53] As succinctly stated by the Tenth Circuit Court of Appeals (Petition A 7): "Neither the due process clause nor the concept of equal protection is available to persons seeking to obstruct the ordinary and necessary exercises of a state's political functions."

CONCLUSION

It is respectfully urged that the petitioners are without standing to maintain their complaint, and that their petition raises no substantial federal question which would entitle them to invoke the jurisdiction of this Court.

Respondents respectfully request that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit be denied.

Respectfully submitted,

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JOHN F. DAVIS, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 550

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; DE LUXE CHECK PRINTERS, INCORPORATED; ET ALS., *Petitioners,*

v.

THE CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas; JAMES L. CONROY, County Clerk of Wyandotte County, Kansas; ET AL.

On Petition for a Writ of Certiorari to the United States States Court of Appeals for the Tenth Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The thrust of respondents' opposition suggests that it may be helpful if we dispose of two newly asserted defenses, and then go on to restate in capsule form the essence of the present case and the reasons why it presents an issue of sufficient public importance to call for review.

First. Respondents here raise the defense of *res judicata* (Br. Op. 8), a matter not mentioned in either opinion below (R. 39-45; Pet. App. A1-A7)—no doubt for the reason that it was not put forward in any of the three answers filed herein (R. 33-34, 34-35, 36-38) except insofar as par. 2 of the City's answer (R. 36) does so by inference. (That paragraph mentions identity of contentions but does not assert either the conclusiveness of, nor any estoppel by, the judgment.)

It should be noted that *res judicata* is specifically mentioned in Rule 8(c), F.R. Civ. P., as a defense that must be affirmatively pleaded. But, passing the question of proper pleading, it thus becomes clear that the defense of *res judicata* is an afterthought, characterized by the usual infirmities of such productions: that defense is quite without substance.

For it is well settled that the doctrine of *res judicata* is available only where the parties are the same (e.g., *Troxell* v. *Delaware, Lack. & West. R.R.*, 227 U.S. 434, 443-444), and only where a party had the opportunity to litigate the same question in a former action (e.g., *Postal Telegraph Cable Co.* v. *Newport*, 247 U.S. 464, 476). From these well settled limitations it follows that judgments in cases where a particular question could not have been adjudicated are not conclusive in later cases. E.g., *Ash Sheep Co.* v. *United States*, 252 U.S. 159, 170: "Rejection of a claim because pursued in an action in which it cannot be entertained does not constitute an estoppel against the pursuit of the same right in an appropriate proceeding. We agree with the court of appeals that 'a judgment is not conclusive of any question which, from the nature of the case or the form of action, could not have been adjudicated in the case in which it was rendered.' "

Here numerous parties on both sides were not involved in the earlier action,* and none of the plaintiffs in the first action were even permitted to litigate the underlying issue, namely, the validity of the challenged annexation ordinances. The earlier case went off, first, on the holding that the plaintiffs there lacked standing even to participate in the proceeding, and, second, that the then Attorney General had an absolute and unreviewable right to dismiss the action, notwithstanding Governor Docking's order to the contrary, so as to prevent any adjudication of the basic issue. *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 350 P. 2d 37. The earlier decision, therefore, was in no sense a judgment on the merits. We deem it appropriate to point out that the Attorney General's motion to dismiss, the pertinent portions of which are quoted at Pet. 5-6, note 2, said nothing as to the merits, and that his first expression regarding the merits (Br. Op. 4, note 7) was not formulated until after the Kansas Supreme Court had handed down its opinion.

Respondents were therefore well advised not to rely on *res judicata* in their pleadings here (R. 33-38).

Second. A similar afterthought is presented by respondents' newly formulated assertion (Br. Op. 8) of the statute of limitations, again a defense not to be found in the pleadings (R. 33-38), and again a defense that under Civil Rule 8(c) must be affirmatively pleaded.

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* Petitioners International Harvester Company, DeLuxe Check Printers, Incorporated, Sunshine Biscuit Company, Inc., and Jones & Laughlin Steel Corporation, as well as respondents James L. Conroy, County Clerk of Wyandotte County, and The Board of County Commissioners of the County of Wyandotte, Kansas, were not parties to the earlier action.

This second afterthought likewise lacks merit. We have the word of the former Attorney General of Kansas that the statute now relied upon, Kan. G.S. 12-502(c) (1957 Supp.), does not bar the present action. He said, in the earlier case (*State ex rel.* v. *City of Kansas City,* Kan. Sup. Ct. No. 41072, Brief of John Anderson, Jr., Attorney General of the State of Kansas, pp. 38-39):

> "A dismissal without prejudice is held to be a failure otherwise than on the merits. * * * Hence if the present case be dismissed without prejudice, a new action might be commenced within a year. It is therefore incorrect to assert that the present action is the last and only opportunity to test the validity of the annexation ordinances in question."

Here the dismissal of the first case became final with the denial of certiorari on June 20, 1960 (363 U.S. 831), while the present action was filed on March 1, 1961 (R. 9), well within the one year limitation.

(For the Court's information, and as a matter of possible interest, we attach in our Appendix hereto the full argument of the former Attorney General on the unsoundness of the bar of limitations.)

Third. With the foregoing unpleaded irrelevancies out of the way, we turn to the heart of petitioners' affirmative case, which we think clear enough to permit of presentation in virtually syllogistic fashion.

1. Respondents' reliance (Br. Op. 12-15) on *Hunter* v. *Pittsburgh,* 207 U.S. 161, is wholly misplaced. That case, and those following it through *Gomillion* v. *Lightfoot,* 364 U.S. 339, all involved municipal annexations directly effected by the acts of State legislatures. Here there was not only no legislative annexation, but there could be none, inasmuch as the Constitution of Kansas specifically prohibits special municipal legislation. See

Kan. Const., Art. 2, § 17; Art. 12, §§ 1 and 5. These provisions, it has been repeatedly held, prevent the Kansas legislature from changing municipal boundaries. E.g., *City of Wyandotte* v. *Wood,* 5 Kan. 603; *Gray* v. *Crockett,* 30 Kan. 138, 1 Pac. 50; *Ritchie* v. *Mulvane,* 39 Kan. 241, 17 Pac. 830; *Levitt* v. *Wilson,* 72 Kan. 160, 83 Pac. 397; *Davenport* v. *Ham,* 72 Kan. 179, 83 Pac. 398; *Wellman* v. *City of Burr Oak,* 124 Kan. 780, 262 Pac. 607; *State, ex rel.,* v. *School District,* 140 Kan. 171, 34 P. 2d 102.

2. Since, therefore the only means of effectuating municipal annexations is through delegated power, there comes into play the principle that one whose rights are affected by a purported exercise of the delegated power, where the legislature, as here, has made only a limited and conditional grant, is entitled under the Fourteenth Amendment to a hearing as to the validity of that exercise. *Browning* v. *Hooper,* 269 U.S. 396, 405-406, and other cases cited at Pet. 15.

3. The present petitioners, however, cannot obtain a hearing under State law. They were not permitted to intervene to assert the illegality of the challenged ordinances in the first proceeding, which the Attorney General was allowed to dismiss on grounds not going to the merits. *State ex rel. Foster* v. *City of Kansas City,* 186 Kan. 190, 350 P. 2d 37, certiorari denied, 363 U.S. 831. Nor can they make that challenge in the statutory proceeding normally available to recover illegal taxes paid under protest, in order to test the validity of whatever levy is ultimately authorized pursuant to the present annexation ordinances that they contend are illegal. *Smith* v. *City of Prairie Village,* 175 Kan. 469, 264 P. 2d 1053.

4. The Kansas courts being thus closed to their assertions of Federal right, it follows that the Federal courts

are open to them under the principle of *Young* v. *Ragen,* 337 U.S. 235, 238, that "it is not simply a question of state procedure when a state court of last resort closes the door to *any* consideration of a claim of denial of a federal right." (Italics in original.) Moreover, notwithstanding the holdings below, a State has no power to close the Federal courts to petitioners, either by State statutes (as in *Railway Company* v. *Whitton,* 13 Wall. 270, 286, and other cases cited at Pet. 12), or, as here, by State doctrines of standing to sue. Access to the Federal courts cannot be thus barred to suitors raising Federal contentions.

Fourth. The volume of municipal annexation proceedings has increased to such an extent that each year now one out of every five cities with a population of 5000 and over is endeavoring to reach out for neighboring lands (Pet. 16-17). Moreover, in nearly one fourth of the States such proceedings are not permitted to be questioned by those affected thereby (Pet. 17).

Whether considerations of municipal convenience may thus deprive individuals of any forum in which their claims of Federal right can be heard, presents, we respectfully submit, an issue of continuing public importance calling for review by this Court.

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NOVEMBER 1962.

APPENDIX

Excerpts from the brief of Attorney General John Anderson, Jr., in the earlier case, *State of Kansas, ex rel.*, v. *The City of Kansas City*, No. 41072 in the Supreme Court of Kansas, pp. 36-39:

"The commissioner's conclusion adverse to dismissal adopts the township's contention that the one year limitation on actions to test validity of annexation provided in 1957 Supp., 12-502c having expired, the present case is the last opportunity for such test, and that as a result if this case is dismissed, said ordinances, whether good or bad, will acquire full force and effect. It is argued that on the authority of *Bowles* v. *Portelance*, 145 Kan. 940, and *Rodman* v. *Ry.*, 65 Kan. 645, G. S. 1949, 60-311, granting an additional year after failure otherwise than on the merits, has no application to actions to test annexation.

"The cases above cited do not support this contention. They were wrongful death actions authorized by G. S. 1949, 60-3203, which fixes a two year period in which only such suits may be commenced. The above cases held that Sec. 60-311 does not extend the time where such suits fail otherwise than on the merits, and correctly so. Sec. 60-3203 creates a new cause of action unknown to the common law, and prescribes its own time limitation which is a limit on the right to maintain such action.

"On the other hand, quo warranto actions such as the present case are ancient common law actions, not created by Sec. 60-3203, nor, in fact, dependent on any statute. As to common law actions, Sec. 60-311 applies in full force, the purpose of such statute being to give a right to pursue an action which has been left undetermined. (*Parker* v. *Dobson*, 78 Kan. 62, 68.) As to such statutes, 34 Am. Jur. 226, §280, states the following distinction:

"'Generally statutes permitting a new action to be brought after the expiration of the period of limitations, upon the failure of the action within that period, have been regarded as applying to actions founded upon non-statutory rights, or upon rights formerly existing independently of statutes. According to the great weight of authority such a saving clause does not apply where the action is founded wholly upon rights granted by a statute which creates a cause of action and specifies the time within which actions may be commenced, inasmuch as the time limit described in such statute is ordinarily regarded as a limitation upon the right itself so that when the time expires, the right is extinguished except as to actions then pending.'

"So far as tests of annexation ordinances are concerned, 1957 Supp., 12-502c, does not make the one year period therein stated a condition upon the right of action, but rather a condition upon which the relief sought may be granted. It does not repeal Sec. 60-311, or even limit it otherwise than to transfer such actions from the five year class of limitations to the one year class. It is a true statute of limitations, to which the rule of the wrongful death statutes does not apply.

"A dismissal without prejudice is held to be a failure otherwise than on the merits. (*McWhirt* v. *McKee*, 6 Kan. 412, 419; *Myer* v. *Wilson*, 131 Kan. 717, 720; *Standard Life* v. *Merrill*, 147 Kan. 121, 124; *Bisagno* v. *Lane*, 168 Kan. 153, 159.) Hence if the present case be dismissed without prejudice, a new action might be commenced within a year. It is therefore incorrect to assert that the present action is the last and only opportunity to test the validity of the annexation ordinances in question."

NOV 30 1962

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 550.

INTERNATIONAL HARVESTER COMPANY; PHILLIPS PETROLEUM COMPANY; SEALRIGHT-OSWEGO FALLS CORPORATION et al.,
Petitioners,

vs.

CITY OF KANSAS CITY, KANSAS; ROBERT J. FOSTER, County Attorney of Wyandotte County, Kansas, et al.,
Respondents.

BRIEF AMICUS CURIAE OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

WILLIAM M. FERGUSON,
Attorney General of the State of Kansas.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

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BRIEF AMICUS CURIAE OF WILLIAM M. FERGUSON, ATTORNEY GENERAL OF THE STATE OF KANSAS, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Believing it is his duty to maintain the laws of his state, William M. Ferguson, Attorney General of the State of Kansas, files this brief *amicus curiae* in opposition to the petition for a writ of certiorari filed by the International Harvester Company *et al.*

STATEMENT.

The petition now under consideration is another chapter in a long standing struggle between the City of Kansas City, Kansas, and property owners in the Fairfax Industrial District, lying just outside the city limits. The city desires to annex the district, a part of which is the city's airport, while owners of property in the industrial district resist annexation. The district has few if any residents and the businesses therein are commercial or industrial in character. For more than thirty-five years, these property owners have enjoyed the advantage of proximity to a flourishing city, yet without being subjected to city taxes. Twice in protracted litigation the opponents of annexation prevented extension of the city boundary. In the last of these two cases[1] the Supreme Court of Kansas clarified the meaning of the statutory language, "whenever any unplatted land lies within (or mainly within) any city",[2] holding that the quoted phrase meant that "a common perimeter of more than fifty per cent" is essential to valid annexation.

In 1958 the city passed new ordinances in compliance with the above decision, and these new ordinances were again attacked by a new action commenced in the name of the state on the relation of the then County Attorney of Wyandotte County, Kansas,[3] against the city and its governing body, and oddly enough, Quindaro Township, within whose boundaries the industrial district was located. But while nominally a defendant, the township, represented by the local firm which represents the present petitioner,

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1. *State ex rel.* v. *Kansas City*, 181 Kan. 870, 876, 317 P.2d 806.

2. G.S. 1949, 13-1602.

3. *State ex rel.* v. *Kansas City*, 186 Kan. 190, 350 P.2d 37.

assumed the part of a plaintiff against its co-defendant, the city and its officers. During the pendency of this action two of the petitioners[4] herein, along with others, sought leave to intervene, being represented by the same local firm which now appears for these petitioners.

After full hearing, the Supreme Court of Kansas dismissed the case upon the motion of the Attorney General, who had superseded the County Attorney. The Court held that neither Quindaro Township nor the interveners could challenge the annexation since annexation involved the corporate limits of the city, a matter which could be raised only by the state through its proper officers. Thereupon, the present petitioners, Phillips Petroleum Company and Sealright-Oswego Falls Corporation, with other interveners, petitioned this Court for a writ of certiorari, which was denied.[5]

In March, 1961, the present petitioners commenced this action in the United States District Court for the District of Kansas, asking for a declaratory judgment that the annexation ordinances were invalid, and to enjoin their enforcement, and for an order directing the defendant County Attorney to institute a *quo warranto* action. Answers for three of the defendants having been filed, the city moved for judgment on the pleadings. The trial court dismissed the action and the complainants appealed to the Circuit Court of Appeals for the Tenth Circuit. That Court, however, affirmed the judgment of the trial court[6] and denied a petition for rehearing.[7] It is to review this judgment that the present petition for certiorari has been filed.

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4. See Petition, p. 4, footnote 1.

5. *Girten Investment Company* v. *State ex rel.*, 363 U.S. 831, 4 L. Ed. 1525.

6. Petition for Certiorari, Appendix A2-7.

7. *Ibid*, Appendix B2.

ARGUMENT.

I.

The Issue Stated.

On page 3 of the petition, it is said that two questions are presented, the first being whether federal courts can adjudicate federal constitutional claims when state law prevents their adjudication in the state courts.

The second question said to be presented is lacking in clarity. It begins by looking backward to some other annexation ordinances which have been declared invalid. It then looks forward to subsequently adopted ordinances which it assumes are "additional and similar" to the former invalid ordinances and stultified by the same defects. Then a further element is added: disposition of a challenge to the validity of these later ordinances otherwise than on the merits through a dismissal by state officers, dubbed "admittedly arbitrary action", although who made such an admission is not stated. Finally we reach the question which is whether all this denies equal protection of the laws to property owners "who would be adversely affected" thereby.

However, on page 16 of the petition the questions here involved are more simply stated, where it is said:

> "—the gravamen of petitioners' complaint here, namely, that by being denied a hearing anywhere on their state law contentions, they are being deprived of federal rights—the right to be heard and the right to be free from a discrimination that lacks any rational basis."

But even this better statement will bear some clarification, particularly with regard to the right to be heard. None of the owners of property in the Fairfax District was, or could properly be, a party in the case of *State ex rel. Foster* v. *City of Kansas City*. Although the pendency of that action was well known, none of the petitioners made any effort to enter that case except Phillips Petroleum Company and Sealright-Oswego Falls Corporation. Surely these other petitioners cannot very well complain that they were denied a hearing in the Kansas Supreme Court.

But how about Phillips Petroleum and Sealright-Oswego Falls? Both joined with the Union Pacific Railroad and Girten Investment Company in an application to be permitted to intervene and in the brief filed by the interveners. Furthermore, they joined with Girten Investment Company in a petition for a writ of certiorari and the brief supporting it. Certiorari being denied, they, with the other petitioners, filed the complaint in the present case and were heard by the trial court on the question of dismissal; and then on appeal they filed briefs and argued the case in the Circuit Court of Appeals. Their complaint is not that they have not been accorded the right to be heard, but rather that they have not been permitted to try the specific issue they want to try, that is, whether the annexation ordinances were invalid, as they claim. Doubtless many another litigant has been similarly disappointed.

Perhaps the essence of the whole controversy is simply this: Have petitioners been denied due process and equal protection by a requirement of state law that annexation ordinances may be challenged only by the state acting through its proper officers, when such officers decline to bring or maintain such action?

II.

The Petitioners Have Not Been Denied Due Process.

Petitioners concede the applicability of the law of Kansas by their statement on page 16 of their petition in the sentence preceding the excerpt above quoted. It is there stated:

> "It is of course true that the merits of the underlying controversy depend entirely on state law."

The trial court and the Circuit Court of Appeals did apply Kansas law, but petitioners criticize the Court for failing to decide the merits and ignoring the gravamen of petitioners' complaint.

The essentials of due process are notice and opportunity to be heard. Surely petitioners cannot claim that they were denied the right to be heard in the district and circuit court of appeals, in each of which courts their whole complaints were set forth in arguments and in briefs. Both courts decided against petitioners and they now complain that because they were not permitted to try the validity of the annexation ordinances, they were denied the right to be heard on that phase of the case.

Apparently petitioners' contention springs from a belief that due process requires the Court not only to hear but also to decide upon every legal problem a litigant may choose to inject into a case. But the orderly administration of justice does not require the Court to indulge every desire of the litigant, nor are they obliged to jump over essential preliminary steps in order to reach the question the litigant may wish to have tried. To do so would often compel the Court to deal with abstractions rather than with realities; whereas, courts are instituted to afford relief only to those persons whose rights have been invaded.

So in every case the plaintiff must show himself possessed of a legally recognized right before the Court can go further.

Absent such a right a plaintiff is not entitled to proceed to try what he deems to be the main issue in the case. As this Court has said:

> "It is an established principle that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action, he must show that he has sustained, or is in immediate danger of sustaining a direct injury as the result of that action, and it is not sufficient that he has merely a general interest common to all members of the public."[8]

There is nothing novel about this. The books are full of cases where plaintiffs have failed because of some defect in the preliminary steps of the case—for want of jurisdiction, improper venue, or because the right asserted belonged to someone other than the plaintiff. Yet plaintiff has had his opportunity to be heard and cannot claim a denial of due process merely because of an adverse ruling on a preliminary matter.

Nor is it a denial of due process if state law bars the door of the courts to some would-be litigants. For example, the statute of frauds provides that "no action shall be brought whereby to charge a party upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith . . ." (G.S. 1949, 33-106). Although this rule may result in hardship in some cases, yet it stands

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8. *Ex parte Albert Le Vitt*, 302 U.S. 633, 82 L. Ed. 493.

as a matter of public policy to prevent fraud. If this prohibition, as long as it has stood upon the statute books, constitutes a denial of due process, generations of able lawyers have failed to catch the point.

Similarly the law of Kansas authorizes actions to test the validity of annexation ordinances only when brought by the County Attorney or the Attorney General, thus preventing such actions by property owners in the annexed area. This, too, is a matter of public policy,[9] for annexation involves the corporate limits and the corporate existence of the city. Certainly it is not in the public interest that cities and their governing bodies should be continually harassed by unnecessary and ill-founded litigation.

Nor does this restriction work undue hardships upon owners of property in the annexed area. It is not a taking of their property, and at bottom, most of the resistance is because of unwillingness to be subjected to city taxes. This point of view ignores the fact that most of the value of the annexed property arises from its proximity to a large and growing city. But subjection of the annexed area to city taxes is not a valid defense to annexation. A fairly recent comment of this Court points out that the due process clause affords no immunity against mere inequalities in tax burdens, nor does it afford protection against their increase as an indirect consequence of a state's exercise of its political powers.[10]

Actions testing the validity of annexations must, in Kansas, be brought in the name of the state to uphold its laws and not to serve the purposes of owners of property in the annexed area. Indeed, in the absence of statute,

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9. *Smith* v. *Emporia*, 168 Kan. 187, 190 P.2d 101.

10. *Gomillion* v. *Lightfoot*, 364 U.S. 329, 81 S. Ct. 125, 5 L. Ed. 2d 110.

the state's legal representatives have no authority to assume, in the name of the state, the burden of conducting an action in behalf of private individuals.[11] Hence, if petitioners have some right in themselves to maintain this action, then their criticism of the County Attorney and Attorney General is uncalled for. But as a matter of public policy, the state has withheld from private parties the right to challenge annexation. The trial court and the Circuit Court of Appeals so held, and hence the petitioners found themselves out of court before they could try the issues they wanted to try. This did not constitute a denial of due process, and the petition now in hearing should be denied.

III.

Petitioners Have Not Been Denied Equal Protection of the Laws.

The petitioners contend that their constitutional rights have been violated in that they have been denied equal protection of the laws. This claim has or may be intended to refer to two different situations, the first of which relates to the Kansas law limiting the right to question the validity of annexation ordinances to actions by the state on the relation of the County Attorney or the Attorney General.

The equal protection clause does not require that all persons be treated exactly alike: It only requires that there be equality of protection to all persons who are similarly situated. The general class of which petitioners are members is that of property owners whose properties are brought into a city by annexation. The limitation on the right to attack annexation as above stated certainly applies

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11. *Dreyer* v. *Siler*, 180 Kan. 765, 308 P.2d 127; *State ex rel.* v. *Mills*, 171 Kan. 397, 233 P.2d 720.

to all property owners in the annexed area. Petitioners cannot say that they are in any different position than other property owners in the annexed area; hence, petitioners' rights have not been discriminated against in favor of other property owners.

Nor can petitioners claim that the permission given exclusively to the state's law officers denies to them equal protection of the laws. As heretofore stated, when such actions are brought, the purpose of the suit is to vindicate the law of the state and not to protect the interest of any property owner in the annexed area. The state is not in any similar circumstance with the property owner, and petitioners cannot equate themselves with the state. The sovereign state has many rights and many powers which the individual citizen cannot appropriate to himself.

Of course the classification or division made by the law must not be capricious or arbitrary, but must rest on a difference which bears a substantial and reasonable relation to the persons affected by it. We think that a sound and rational relation exists for permitting the state to inquire into the boundaries and corporate existence of a city, and denying that privilege to property owners in the annexed area.

The rule in question has as its basis not only prevention of a multiplicity of suits, but also the stronger reason of the public welfare in that to permit indiscriminate attacks upon corporate existence at the whim of any dissatisfied person would hinder the effective administration of government. Hence, as a matter of public necessity, and not from any desire to injure, the rule has been adopted that only the state, through its proper representatives, may bring actions affecting annexation to municipal entities created by the state for the purposes of local government.

If the claim of denial of equal protection be referred to the action of the former Attorney General in causing dismissal of *State ex rel. Foster* v. *Kansas City,* petitioners are in no better position. In that case,[12] the Court held that in deciding whether a particular situation merited challenge by the state, the County Attorney or Attorney General acted as officer of the Court, restricted in his conduct by the canons of ethics. Hence, if he was not convinced of the illegality of the annexation, it was not only his right, but his duty to discontinue that action. In so doing he exercised his official discretion, which neither the property owner nor the Court could control. Being convinced that the ordinances in question conformed to the Court's definition of "within (or mainly within)", he did the only honorable thing he could do, that is by dismissing the case. The Court approved his action, and neither the defendants in that case nor the present petitioners have any lawful ground of complaint.

We contend that petitioners have failed to show any sufficient ground for their petition for certiorari and that the Court should deny the same.

Respectfully submitted,

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12. *State ex rel.* v. *Kansas City,* 186 Kan. 190, 350 P.2d 37.